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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1130

MELVIN FRIEDMAN, ROBERT L. MITCHUM, PHILLIP FISHMAN, WENDELL BOYD, and SOONER STATE NEWS AGENCY, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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MELVIN FRIEDMAN, ROBERT L. MITCHUM, PHILLIP FISHMAN, WENDELL BOYD, and SOONER STATE NEWS AGENCY, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioners respectfully pray that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above case on November 18, 1974.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 506 F.2d 511, and appears in Appendix A hereto.

JURISDICTION

The judgment of the United States Court of Appeals was entered on November 18, 1974. A Petition for Rehearing was filed by Petitioners and denied by the Court of Appeals by an Order entered on January 7, 1975. A copy of the Order appears as Appendix B hereto. On January 29, 1975, Mr. Justice Blackmun granted an extension to Petitioners to and including March 8, 1975, within which to file this Petition. This Court's jurisdiction is invoked under *Title 28 United States Code* §1254(1).

QUESTIONS PRESENTED

1. Whether a conviction for conspiracy to violate a federal obscenity statute (18 USC §1465) may be found upon proof of presumptively protected First Amendment activities as the sole overt acts committed in furtherance of the conspiracy.

2. Whether the requirement of scienter in a prosecution for conspiracy to violate a federal obscenity statute is identical to the scienter requirement in a prosecution for a substantive violation of such a statute.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First, Fifth and Sixth Amendments to the Constitution of the United States and Title 18 United States Code §§2, 371 and 1465 are set forth in Appendix C hereto.

STATEMENT OF THE CASE

Petitioner Sooner State News Agency, Inc. was convicted, in the United States District Court for the Eastern District of Arkansas, on two counts of knowingly transporting in the United States mail obscene literature for the purpose of sale and distribution in violation of *Title 18 United States Code §§1465 and 2.* In a related case, Petitioners Melvin Friedman, Robert L. Mitchum, Phillip Fishman and Wendell Boyd were convicted on a single count of conspiracy to violate *Title 18 USC §1465 and §2,* the conspiracy being in violation of *18 USC* §371. In addition to the conspiracy count upon which he was convicted, Petitioner Friedman was originally indicted on thirteen counts of alleged violations of *Title 18 U.S.C. §§1465 and 2.* At the conclusion of the trial, however, the District Court granted this Petitioner's Motion for a Judgment of Acquittal on those counts.

The basis for the conviction of Petitioner Sooner State News Agency was the shipment, between July 6, 1972 and February 15, 1973, of allegedly obscene printed materials from Tulsa, Oklahoma, to bookstores in Little Rock, Arkansas.

Petitioners Friedman and Mitchum were incorporators and officers of Sooner State News. Both men were also officers of Peachtree National Distributors, Inc., of Atlanta, Georgia,

another corporation alleged to have shipped obscene materials to Little Rock, Arkansas. Petitioner Mitchum was also an officer of Paris Bookstalls, Inc., the corporation which operated the recipient bookstores in Little Rock. Petitioner Wendell Boyd was the manager of the Little Rock bookstores, and Petitioner Fishman was an employee of Peachtree National Distributors who assisted in the establishment of operations at the Little Rock bookstores.

The above acts of the Petitioners in, *inter alia*, incorporating and acting as officers of a corporation engaged in the distribution of printed material and establishing and operating bookstores, were cited in the indictment herein as overt acts committed in the furtherance of the conspiracy for which the individual Petitioners stand convicted. Although the indictment recited further overt acts in the interstate shipment of allegedly obscene materials, the jury was instructed that a conspiracy conviction did not necessitate a finding that such illegal overt acts occurred. The jury was specifically instructed that proof of the conspiracy required only a finding by them that "*one* of the overt acts alleged was knowingly done by one of the conspirators." (T. 1100-1101.) Indeed, the only charge of a substantive violation of *Title 18 U.S.C.* §*1465* against the alleged conspirators herein was dismissed by the Court upon the completion of trial.

REASONS FOR GRANTING THE WRIT

I.

A HOLDING THAT A CONVICTION FOR CONSPIRACY MAY BE FOUNDED UPON A FINDING THAT PRESUMPTIVELY PROTECTED

FIRST AMENDMENT ACTIVITIES CONSTITUTED THE SOLE OVERT ACTS COMMITTED IN FURTHERANCE OF THE CONSPIRACY WOULD IMPERMISSIBLY CHILL THE EXERCISE OF THE FIRST AMENDMENT RIGHTS OF FREE SPEECH, FREE PRESS, AND ASSOCIATION.

The individual Petitioners in this case were convicted on one count of conspiracy to violate *Title 18 U.S.C. §§ 1465 and 2*. The overt acts alleged in the indictment to have been committed in furtherance of the conspiracy included, *inter alia*, the operation and control of a book distributing company, the operation of retail bookstores, the incorporation of a book distributing company, the election of officers to a book distributing company, and the obtaining of municipal business licenses for the operation of bookstores. The jury was specifically instructed that proof of the alleged conspiracy could rest upon a finding that *any* of the enumerated overt acts occurred.

While Petitioners do not contest that seemingly innocent activity may constitute the necessary overt acts underlying a conviction for conspiracy, an unconstitutional chilling effect is precipitated when such acts consist solely of First Amendment protected speech, press or associational activities such as the operation of book distributing companies or retail bookstores or the election of officers to corporations engaged in book distribution. Individuals may tend to steer clear of such protected activity if it may later form the basis for a conviction for conspiracy to violate obscenity laws even in the absence of any evidence of violations or even attempted violations of such laws.

A conviction for conspiracy under *Title 18 U.S.C. §371* necessitates proof of an "overt act" committed by one of the conspirators in furtherance of the conspiracy. *United States v. Williams*, 474 F.2d 1047 (CA 5 1973); *United States v. Fellabaum*, 408 F.2d 220 (CA 7 1969) *cert. denied*, 396 U.S. 858; *United States v. Root*, 366 F.2d 377 (CA 9 1966), *cert. denied*, 386 U.S. 912; *Huff v. United States*, 192 F.2d 911 (CA 5 1951), *cert. denied*, 342 U.S. 946. In essence, the gist of the offense of conspiracy is an agreement among conspirators to commit an offense attended by an act of one of the conspirators. *United States v. Falcone*, 311 U.S. 205 (1940). The overt act is part of the conspiracy itself, rather than mere evidence of the conspiracy. *Smith v. United States*, 92 F.2d 460 (CA 9 1937).

It is true and conceded by the Petitioners that lawful activity may be used as the overt acts to establish a conspiracy in violation of *Title 18 U.S.C. §371*, *United States v. Charles Pfizer & Co., Inc.*, 281 F.Supp. 837 (S.D.N.Y. 1968), rev'd on other grounds, 437 F.2d 957, aff'd *per curiam* by an equally divided court, 404 U.S. 548. An issue of *First Amendment* dimension arises, however, when the overt acts themselves are constitionally protected speech, press or associational activities. Where the overt acts consist of engaging in lawful speech and associational activities, both the spirit and the letter of the *First Amendment* are offended. See *Samuels v. Mackell*, 401 U.S. 66, 75 (1971) (Douglas, J., concurring).

In *Yates v. United States*, 354 U.S. 298 (1957), this Court, distinguished between mere advocacy and advocacy to incite action in Smith Act prosecutions. Mere advocacy, the Court said, without concrete action or advocacy to action, is

protected by the *First Amendment*. In *Baker v. Binder*, 274 F. Supp. 658 (W.D. Ky. 1967), a three-judge District Court held the Kentucky Criminal Syndicalism statute unconstitutional. It was held that mere advocacy was not punishable, and that statutes such as the one in question were overbroad and sweeping and impinged upon the *First Amendment*. *Baker* also declared the Kentucky conspiracy statute unconstitutional insofar as it criminalized a banding together to "disturb" persons because the statute was "embracive of terms of expression."

In *Brandenburg v. Ohio*, 395 U.S. 444 (1969), the Court said in regard to Ohio's Criminal Syndicalism statute that:

> "... as we said in Noto v. United States, 367 U.S. 290, 297-298, 6 L.Ed.2d 836, 841, 81 S.Ct. 1517 (1961), 'the mere abstract teaching ... of the moral propriety or even moral necessity for a resort to force and violence is not the same as preparing a group for violent action and steeling it to such action."

* * * * *

> "A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control. Cf. Yates v. United States, 354 U.S. 298, 1 L.Ed.2d 1356, 77 S.Ct. 1064 (1957); DeJonge v. Oregon, 299 U.S. 353, 81 L.Ed. 728, 57 S.Ct. 255 (1937); Stromberg v. California, 283 U.S. 359, 75 L.Ed. 1117, 51 S.Ct. 532, 73 ALR 1484 (1931)."

If advocacy and assemblages relating to treason are protected, then surely more innocent association and expressions are likewise protected. *Title 18 U.S.C. §§371 and*

1465 together create a weapon that has a serious and chilling effect on *First Amendment* rights. In *Brandenburg v. Ohio, supra,* the Court held that a robed Klu Klux Klansman's statement on film that "the niggers should be returned to Africa, the Jews returned to Israel . . ." was protected because it was mere advocacy. Yet, here we have a conspiracy conviction based on overt acts consisting of ordinary press, associational and speech activities.

There is a close nexus between freedom of speech and of association. Freedom to associate was first fully formulated as a *First Amendment* right in *NAACP v. Alabama,* 357 U.S. 449 (1958). See, *Giltow v. New York,* 268 U.S. 652 (1925); *Cantwell v. Connecticut,* 310 U.S. 296 (1940). The Court, in *NAACP v. Alabama,* said:

> ". . . state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny . . . [A]bridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action . . . The governmental action challenged *may appear to be totally unrelated to protected liberties.*"

Supra, at 460-461. (emphasis supplied).

The fact that the combination of *Title 18 U.S.C. §371* with *Title 18 U.S.C. §1465* may have an adverse effect on the exercise of *First Amendment* rights which is unintended does not thereby relieve this Court from curtailing and preventing such an effect. *First Amendment* rights have the highest standards of protection in the American system of jurisprudence, and those rights may only be disturbed when there exists a demanding, overridng and compelling governmental interest, and even then such necessary

governmental incursions are to be severely limited. *Dombroski v. Pfister*, 380 U.S. 479 (1965); *Keyishian v. Board of Regents of New York*, 385 U.S. 589 (1967); *DeJonge v. Oregon*, 299 U.S. 553 (1937). If speech is to be regulated at all, such regulation is to be narrowly drawn so as not to impinge on rights that are properly beyond the sphere of that narrowly conceived area of governmental regulation. *NAACP v. Button*, 371 U.S. 415 (1963); *Shelton v. Tucker*, 364 U.S. 479 (1960).

Statutes may regulate speech only with narrow specificity or else cherished *First Amendment* freedoms will suffer. Real or vague threats of prosecutions, whether they turn out to be successful or not, clearly deter people from the free exercise of those rights. "So long as the statute remains available to the State, the treat of prosecutions of protected expression is a real and substantial one. Even the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression." *Dombroski, supra*, at 494. See, *NAACP v. Button,supra; Keyishian v. Board of Regents of New York, supra; Speiser v. Randall, supra; Shelton v. Tucker, supra; DeJonge v. Oregon, supra; United States v. Baranski*, 484 F.2d 556 (CA 7 1973); *United States v. Dellinger*, 472 F.2d 340 (CA 7 1972); *United States v. Spock*, 416 F.2d 165 (CA 1 1969).

> "The area of proscribed conduct will be adequately defined and the deterrent effect of the statute contained within constitutional limits only by authoritative constructions sufficiently illuminating the contours of an otherwise vague prohibition. As we observed in Baggett v. Bullit, supra, this cannot be satisfactorily done through a series of criminal prosecutions, dealing as they inevitably must with only a narrow portion of thy prohibition at any one

> time, and not contributing materially to articulation of the statutory standard. We believe that those affected by a statute are entitled to be free of the burdens of defending prosecutions, however expeditious, aimed at hammering out the structure of the statute piecemeal, with no likelihood of obviating similar uncertainty for others."

Dombroski, supra, at 380 U.S. 490-491.

The federal conspiracy statute when utilized in connection with the federal obscenity statute is not so narrowly drawn. The scope of the statute permits today's pleasant conversation to become an overt act in a conspiracy months or years later. When people establish and operate a film and book distribution business, and years later a distributed item is found to be obscene, it is constitutionally impermissible for the government to reach back into history and term the lawful operation of a press or speech related business the *only* "overt activity" establishing a conspiracy.

There is a pronounced chill upon the exercise of *First Amendment* rights when persons can anticipate that their presumptively lawful activities might someday be used against them in a criminal prosecution as the sole proof of conspiratorial activity. People tend to steer far away from activity that might later be termed the only "overt acts in a conspiracy," and the chilling effect on protected activity becomes clear. *Speiser v. Randall,* 357 U.S. 513 (1958); *NAACP v. Button, supra.* The use of conspiracy here condones guilt by mere association, as well as inhibiting the exercise of free press and speech rights. *Elfbrandt v. Russell,* 384 U.S. 11 (1966); *United States v. Owen,* 492 F.2d 1100 (CA 5 1974); *United States v. Webb,* 359 F.2d 588 (CA 6 1966); *cert. denied,* 385 U.S. 905; *NAACP v. Alabama, supra.*

Attempts to define the crime of conspiracy have proven extremely difficult, if not completely frustrating. Mr. Justice Jackson, in his noted concurrence in *Krulewitch v. United States*, 336 U.S. 440 (1949). concluded that the:

> "... modern crime of conspiracy is so vague that it almost defies definition .... [I]t, chameleon-like, takes on a special coloration from each of the many independent offenses on which it may be overlaid. It is always 'predominantly mental in composition' because it consists primarily of a meeting of minds and an intent.
>
> * * * * *
>
> "It also may be trivialized, as here, where the conspiracy consists of the concert of a loathsome panderer and a prostitute to go from New York to Florida to ply their trade (see 145 F.2d 76, 156 ALR 337 for details) and it would appear that a simple Mann Act prosecution would vindicate the majesty of federal law. However, even when appropriately invoked, the looseness and pliability of the doctrine present inherent dangers which should be in the background of judicial thought wherever it is sought to extend the doctrine to meet the exigencies of a particular case."

336 U.S. at 446-449.

The possibility that conviction for such a vague and nebulous crime may be founded upon mere proof of constitutionally protected *First Amendment* activities will go far to chill the exercise of *First Amendment* rights. The overt act requirement, rather than serving its intended limiting function with respect to conspiracy prosecutions, then becomes a threat to all those who might engage in protected activity.

A combination of statutes such as these thus evince and create a chilling effect that is impermissible in American jurisprudence. *Dombroski v. Pfister, supra; United States v. Dellinger, supra.* When *Title 18 U.S.C.* §§*371* and *1465* are considered in conjunction, the normal, protected speech, press, and business activities of the Petitioners herein are unconstitutionally swept into a criminal prosecution.

II.

THE REQUIREMENT OF SCIENTER IN A PROSECUTION FOR CONSPIRACY TO VIOLATE TITLE 18 U.S.C. §1465 NECESSITATES PROOF OF A *SPECIFIC* INTENT TO VIOLATE THE STATUTE WHICH IS NOT REQUIRED IN A PROSECUTION FOR A SUBSTANTIVE VIOLATION OF THE STATUTE ITSELF.

In order that a conspiracy be proved, there must first be proved the existence of the agreement of the parties to commit an offense against the United States and their willful participation in the conspiracy. *Ingram v. United States,* 360 U.S. 672 (1959); *United States v. Bostic,* 480 F.2d 965 (CA 6 1973); *United States v. DeLoach,* 279 F. Supp. 720 (W.D. Mo. 1968). Knowledge of the conspiracy and its unlawful purpose, and intent to participate therein to further that purpose are essential elements of the crime. Neither mere association with others engaged in illegal activity, nor knowledge of a conspiracy's existence alone constitute proof of participation. Neither mere association with others engaged in illegal activity, nor knowledge of a conspiracy's existence alone constitute proof of participation. *United States v. Anderson,* 352 F.2d 500 (CA 6 1965), *cert. denied,* 384 U.S. 955 (1966); *United States v. Webb, supra.*

With respect to the specific intent requirement in conspiracy prosecutions, the Court of Appeals below held:

> "The required intent is no less nor no more than that necessary to commit the substantive crime .... With reference to prosecutions for substantive violations of federal obscenity statutes, the Supreme Court has held that 'knowledge of the contents[,] * * * character and nature of the materials' is sufficient to satisfy the intent requirement. Hamling v. United States, supra, ____ U.S. ____, 94 S.Ct. at 2910 .... [In a conspiracy prosecution it is thus] sufficient to show that a defendant had knowledge of the contents of the materials he conspired with others to transport in interstate commerce and that he knew the character and nature of the materials." 506 F.2d 516-517.

In holding the scienter requirement for conspiracy to be identical to the scienter requirement for the substantive offense, the Court of Appeals erred.

Even though knowledge of a material's legally obscene status is not required, and thus traditional *scienter* is not required for the class of speech crimes qua obscenity crimes (see *Hamling*), actual knowledge, intent – *scienter* –*are* required for conviction of a conspiracy to commit the substantive offense. *United States v. Mishkin*, 317 F.2d 634 (CA 2 1963), *cert. denied*, 375 U.S. 827. The Court of Appeals in *Mishkin*, however, did not deal authoritatively with *scienter* in conspiracy crimes because in that case the defendants had conceded that the material they were dealing with was obscene. 317 F.2d, at 637.

For a conviction of conspiracy to stand, there must be proof of a specific intent to violate the substantive statute.

United States v. Crimmins, 123 F.2d 271 (CA 2 1941) (Learned Hand, J.). And in a conspiracy to violate Federal obscenity laws, there must be found an intent to transport obscene goods across state lines with actual knowledge that this is to be accomplished. *United States v. Cangiano*, 491 F.2d 906 (CA 2 1974); *United States v. Falcone*, 109 F.2d 579 (CA 2 1940), *aff'd*, 311 U.S. 205.

There can be no intent to commit a substantive offense without the actual knowledge that the acts contemplated are illegal, and that there is an agreement to commit an offense against the United States. *Ingram v. United States, supra; Pereira v. United States*, 347 U.S. 1 (1954). This is true in conspiracy cases even though, as here, the *scienter* required in obscenity convictions is minimal. Even though an offense does not require *scienter*, conspiracy to commit it does. *Landen v. United States*, 299 Fed. 75 (CA 6 1924); *Developments In the Law – Criminal Conspiracy*, 72 Harv. L. Rev. 920 (1959).

The essential elements of a violation of *Title 18 U.S.C. §1465* are a *knowing* transportation in *interstate commerce* of *obscene* material for *sale* or *distribution*. This Court has only recently re-defined what is meant by the term "obscene": (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. *Miller v. California*, 413 U.S. 15, 24 (1973).

The alleged conspiracy in this case as well as the alleged activities in its furtherance, however, all transpired prior to

the formulation of the above definition. They occurred while this Court was in the midst of its long drawn out and well-known struggle with the definition of obscenity. From *Roth v. United States*, 354 U.S. 478 (1957), through *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), to *Miller v. California, supra*, the Supreme Court has been attempting to define what is "obscene" and whether or not the obscenity laws, state or federal, give an accused adequate notice of what is proscribed. If nothing else, seventeen years of constitutional adjudication have indicated that the laws of this country, and its courts, have been somewhat confused.

It is surely grossly violative of constitutional principles when one is accused of conspiring to commit what is only later determined to be a crime. Conspiracy and obscenity statutes are, in conjunction with each other, inherently vague and overbroad. The so-called definition of obscenity is necessarily tied to the element of time – it looks to *contemporary* values, morals, and standards. Therefore, whether a particular item is obscene or not, or even arguably so, can only be determined at a fixed point in time. Seventeen years of Supreme Court attempts at defining obscenity have clearly shown the vast changes in what is or is not socially and legally acceptable material.

It is inconveivable that the Petitioners herein could be held to have intended to violate the law at a time when not even a majority of this Court could agree as to what the law was. As Mr. Chief Justice Burger said in *Miller v. California, supra:*

> "It is certainly true that the absence, since *Roth*, of a single majority view of this Court as to proper standards for testing obscenity has placed a strain on

> both state and federal courts. But *today, for the first time since Roth was decided* in 1957, a majority of this Court has agreed on concrete guidelines to isolate 'hard core' pornography from expression protected by the First Amendment. *Now* we may abandon the casual practice of Redrup v. New York, 386 U.S. 767 (1967) and *attempt* to provide positive guidance to federal and state courts alike."

413 U.S. at 29. (emphasis supplied).

In light of the inability of the Court to reach agreement on the limits of federal obscenity prosecutions, the Petitioners cannot fairly be held to a higher standard. They could not have been adequately warned, if indeed they were warned at all, that their actions were violative of the law. Without knowledge as to what the law was, they could not have intended to violate it. Without an intent to violate the law, there can be no conviction for conspiracy.

CONCLUSION

It is clear that the joint use of *Title 18 U.S.C. §371* and *Title 18 U.S.C. §1465* precipitate an unconstitutional chilling effect upon the exercise of free speech, press and associational activities since such protected activities may constitute the sole overt acts upon which a conspiracy conviction rests.

It is further clear that the Court below erred in holding that the *scienter* required in a prosecution for conspiracy to violate federal obscenity laws "is no less nor no more than that necessary to commit the substantive crime." 506 F.2d 516.

For the reasons set forth herein, it is respectfully urged that a Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 74-1224
No. 74-1225
No. 74-1226

UNITED STATES OF AMERICA,
Appellee,

v.

MELVIN FRIEDMAN, ROBERT L. MITCHUM, PHILLIP FISHMAN AND WENDELL BOYD,
Appellants.

Appeals from the United States District Court for the Eastern District of Arkansas.

No. 74-1227

UNITED STATES OF AMERICA,
Appellee,

v.

SOONER STATE NEWS AGENCY, INC.,
Appellant.

Submitted: September 10, 1974
Filed: November 18, 1974

Before VAN OOSTERHOUT, Senior Circuit Judge, HEANEY and STEPHENSON, Circuit Judges.

VAN OOSTERHOUT, Senior Circuit Judge.

These consolidated appeals are the result of convictions of individual defendants Melvin Friedman, Robert L. Mitchum, Phillip Fishman and Wendell Boyd on a single count indictment alleging a conspiracy to violate 18 U.S.C. §§ 1465 and 2, all in violation of 18 U.S.C. § 371. Corporate defendant Sooner State News Agency, Inc., (hereinafter Sooner State News) appeals its conviction in a related case on two counts of knowingly transporting in the United States mail obscene literature for the purpose of sale and distribution in violation of 18 U.S.C. §§ 1465 and 2.

In addition to the conspiracy count, individual defendant Friedman was originally indicted in two separate indictments on some thirteen counts alleging substantive violations of 18 U.S.C. §§ 1465 and 2. However, at the conclusion of the evidence the trial court granted Friedman's motion for judgment of acquittal on these counts.

The individual defendants received sentences ranging from thirty months imprisonment (15 days incarceration with balance on probation) and $1500 fines to 42 months (30 days incarceration with balance on probation) and a $5000 fine. Sooner State News was fined $2500 on each of two counts the government elected to prosecute on.

The overt acts which culminated in the indictments of the defendants consisted of the use of the United States mail to ship allegedly obscene printed materials from Atlanta, Georgia, and Tulsa, Oklahoma, to Little Rock, Arkansas, bookstores. These acts allegedly occurred on July 6, 1972, and February 15, 1973. The magazine type literature before us, which was the basis of the indictments, depicts photographically adult men and women participating in various sex acts including sexual intercourse with penetration, anal intercourse, fellatio, cunnilingus and masturbation. The participants in the various photographs are both hetrosexual and homosexual. The magazines include textual material in

article form which is largely factual in nature but almost totally unrelated to the accompanying pictures described herein. The jury found that the material in question was obscene under the three-pronged test found in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts*, 383 U.S. 413, 86 S.Ct. 975, 16 L. Ed. 2d 1 (1966).[1]

Defendants Friedman and Mitchum were incorporators and officers of Sooner State News located in Tulsa, Oklahoma, which mailed part of the above described literature to recipients in Little Rock, Arkansas. Mitchum was also the president of Paris Bookstall, Inc., d/b/a Books Limited No. 1 and Books Limited No. 2, the recipients of the allegedly obscene material in Little Rock. Both men were officers in Peachtree National Distributors, Inc., of Atlanta, Georgia, from which part of the allegedly obscene material came. Defendant Wendell Boyd was the manager of the recipient adult book stores in Little Rock. Defendant Fishman was an employee of Peachtree National Distributors, Inc. and was primarily responsible for establishing Hot Springs and Fayetteville, Arkansas, adult bookstores. He also assisted the owners of the Little Rock bookstores in establishing their operations.

In this appeal the individual defendants contend: (1) That their conviction under the general conspiracy statute, 18 U.S.C. § 371, violates the constitutional rights guaranteed

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[1] Although the trial occurred after the Supreme Court's decision in *Miller v. California*, 413 U.S. 15 (1973), the trial court granted defendants' request that they be tried under the *Memoirs* criteria for obscenity. On appeal defendants suggest it was error to use the *Memoirs* criteria after *Miller* was decided. However, defendants asked for, received, and did not object to instructions based on *Memoirs*. Accordingly they cannot successfully claim as error that which they themselves advocated and did not object to at trial.

them by the first, fifth and sixth amendments of the federal constitution; and (2) the evidence is insufficient to sustain the convictions of conspiracy. Additionally, the individual defendants and Sooner State News, the corporate defendant, contend: (1) The indictment under 18 U.S.C. § 1465 is fatally defective because the statute denies defendants equal protection, due process and freedom of speech in violation of the first, fifth and sixth amendments to the federal constitution; and (2) that 18 U.S.C. § 1465 violates the due process clause of the fifth amendment because it is unconstitutionally vague even with *Miller v. California*, 413 U.S. 15 (1973), read into it. Defendant Friedman further contends that the doctrines of double jeopardy and collateral estoppel prevent the government from maintaining the conspiracy prosecution against him under 18 U.S.C. § 371 when substantive indictments alleging violations of 18 U.S.C. § 1465 had previously been dismissed as to him.

Defendant Sooner State News initially contends the indictment charging violations of 18 U.S.C. § 1465[2] is fatally

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[2] 18 U.S.C. § 1465 provides in pertinent part:

Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious or filthy book, pamphlet, picture film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character shall be fined not more than $5,000 or imprisoned not more than five years, or both.

The indictment itself uses the following terminology:

> [O]n or about the 12th day of July, 1972, * * * the defendant Sooner State News Agency, Inc., * * * knowingly did transport and caused to be transported in interstate commerce * * * an obscene, lewd, lascivious and filthy book and publication * * * for the purpose of the sale and distribution of said book and publication, all in violation of [18 U.S.C. § 1465].

defective because § 1465 on its face and as applied abridges certain rights guaranteed by the first, fifth and sixth amendments. The individual defendants join in this constitutional challenge to § 1465. Specifically they argue that at the time of the alleged offense § 1465 was not limited to any specifically defined sexual conduct as is required by *Miller v. California, supra,* that an unworkable "national standard" for judging obscenity is contemplated by § 1465, and that the indictment incorporated the pre-*Miller* "utterly without redeeming social value" test for obscenity articulated in *Memoirs v. Massachusetts, supra,* 383 U.S. at 418, but rejected in *Miller.* We find defendants' contentions to be without merit.

The lack of a specifically defined standard for obscenity in the federal obscenity statutes[3] has not been and is not a constitutional barrier to prosecution under those statutes. *Roth v. United States,* 354 U.S. 476, 491 (1957). *See Hamling v. United States,* 42 U.S.L.W. 5035 (U.S. June 24, 1974). In *Roth* the Court said:

> This Court * * * has consistently held that lack of precision is not itself offensive to the requirements of due process. "* * * [T]he Constitution does not require impossible standards"; all that is required is that the language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices * * *." [Citation omitted.] * * *
>
> [W]e hold that [the federal obscenity statutes], applied according to the proper standard for judging obscenity, do not offend constitutional safeguards against convictions based upon protected material, or

[3] The terms "obscene, lewd, lascivious, or filthy" are used to describe proscribed activity in the federal obscenity statutes. 18 U.S.C. §§ 1461-65.

> fail to give men in acting adequate notice of what is prohibited. [354 U.S. at 491-92].

Moreover, the language of 18 U.S.C. § 1461 has previously been construed to apply only to that which is obscene under the then prevailing obscenity guidelines. *See e.g. United States v. Reidel*, 402 U.S. 351 (1971); *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962). Such prior construction is permitted by *Miller* to uphold an obscenity statute. *Miller v. California, supra*, 413 U.S. at 25. More recently in *Hamling v. United States*, 42 U.S.L.W. 5035, 5043 (U.S. June 24, 1974), the United States Supreme Court "made clear [their] willingness to construe federal statutes dealing with obscenity to be limited to material such as that described in *Miller*." *See United States v. 12 200-Ft. Reels of Film*, 413 U.S. 123, 130 n.7 (1973); *United States v. Groner*, 494 F.2d 499, 501 (5th Cir. 1974). In our view the exhibits before us unquestionably fall within the "hard-core" poronography which may be permissibly proscribed under either *Memoirs* or *Miller*. Accordingly, § 1465 does not and did not prior to *Miller* lack constitutionally required specificity.

Prior to trial all defendants requested that the trial be conducted under the *Roth-Memoirs* standards for obscenity including the use of a "national standard." The trial court agreed and the jury was so instructed despite the fact that *Miller v. California, supra*, which provided for "community standards" had been decided.[4] Defendants now argue that it was a denial of due process to convict them on the basis of an unworkable "national standard." A party cannot be heard to complain on appeal of that which he requested and

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[4] The government objected to the use of the *Roth-Memoirs* standard for obscenity and requested that the trial be conducted under *Miller*.

received in the trial court without objection.[5] Similarly, the defendants cannot here complain that the indictment incorporated the *Memoirs* "utterly without redeeming social value" test for obscenity which has been rejected in *Miller.* If there was such an incorporation, it was by defendants' own request that they be tried under *Roth-Memoirs* rather than *Miller.*[6]

The defendants next argue that 18 U.S.C. § 1465 is unconstitutionally vague even with *Miller v. California, supra,* read into it. We note that the language found in 18 U.S.C. §§ 1461 and 62 is similar to that found in § 1465. Referring to § 1461, the Court in *Roth v. United States, supra,* 354 U.S. at 492, said:

> [This] statute, applied according to the proper standard for judging obscenity, do[es] not offend constitutional safeguards against convictions based

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[5] Without deciding the issue raised herein, we note that the Supreme Court has not required as a constitutional matter that federal obscenity cases be tried under any precise geographic area standards. *See Hamling v. United States,* 42 U.S.L.W. 5035, 5040 (U.S. June 24, 1974).

[6] Defendants were entitled to be tried under *Miller* since it had been decided after the alleged offense but before their trial. Nevertheless defendants are entitled to the benefit of any constitutional principle enunciated in *Miller. See Hamling v. United States,* 42 U.S.L.W. 5035, 5039 (U.S. June 24, 1974). However, as the Court in *Hamling* stated:

> Since *Miller* permits the imposition of a lesser burden on the prosecution in this phase of the proof of obscenity than did *Memoirs,* and since the jury convicted these petitioners on the basis of an instruction concededly based on the *Memoirs* test, petitioners drive no benefit from the revision of that test in *Miller.* [42 U.S.L.W. at 5044.]

> upon protected material, or fail to give men in acting adequate notice of what is prohibited.

This same language was cited with approval in *Hamling v. United States, supra,* 42 U.S.L.W. at 5038. The Court has not changed its position with respect to the constitutionality of § 1461. *United States v. Sulaiman,* 490 F.2d 78, 79 (5th Cir. 1974), *cert. denied,* 43 U.S.L.W. 3230 (U.S. Oct. 21, 1974).[7] Section 1462 has likewise been upheld against a vagueness challenge. *United States v. Groner,* 494 F.2d 499, 501, (5th Cir. 1974). We hold that 18 U.S.C. § 1465 is not unconstitutionally vague. *See United States v. New Orleans Book Mart, Inc.,* 490 F.2d 73, 75 (5th Cir. 1974); *United States v. Manarite,* 448 F.2d 583, 594 (2d Cir. 1974); *United States v. Marks,* 364 F.Supp. 1022, 1026 (E.D. Ky. 1973).

The individual defendants argue that certain constitutional rights guaranteed by the first, fifth and sixth amendments to the federal constitution were violated by the use of the federal conspiracy statute, 18 U.S.C. § 371, to prosecute them. Specifically, defendants contend that the conspiracy statute may not be used to prosecute individuals for acts which are protected by the first amendment. The short answer to defendants' argument is that obscenity is not protected by the first amendment. *Miller v. California,* 413 U.S. 15, 23 (1973); *Roth v. United States,* 354 U.S. 476, 485 (1957). Since the federal obscenity statutes are to be construed to prohibit the interstate transfer of "hard-core" pornography only, *United States v. 12 200-Ft. Reels of Film,* 413 U.S. 123, 130 n. 7 (1973), we do not find that prosecution under the general conspiracy statute for conspiring to violate 18 U.S.C. § 1465 has any chilling effect on protected first amendment rights. The cases cited by

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[7] The Supreme Court has recently denied certiorari in several obscenity cases in which the constitutionality of state and federal statutes was challenged. *See* 43 U.S.L.W. 3224, 25, 28-35 (U.S. Oct. 21, 1974).

defendants, such as *United States v. Spock*, 416 F.2d 165 (1st Cir. 1969), are inapposite here because they deal with protected first amendment rights such as voicing their opposition to the government.

The individual defendants contend that to sustain a conviction under 18 U.S.C. § 371 (conspiracy) the Government must show that the defendants had actual knowledge of the contents of the allegedly obscene material and that they knew the material was legally obscene. Defendants attempt to distinguish the scienter requirement for conspiracy from that in the substantive offense, here § 1465. Where conspiracy is charged, the Government has the burden of establishing that a defendant had the specific intent to violate the substantive statute. *United States v. Cangiano*, 491 F.2d 906, 909 (2nd Cir. 1974). The required intent is no less nor no more than that necessary to commit the substantive crime. *United States v. Mauro*, 501 F.2d 45, 51 (2d Cir. 1974). With reference to prosecutions for substantive violations of federal obscenity statutes, the Supreme Court has held that "knowledge of the contents[,] * * * character and nature of the materials" is sufficient to satisfy the intent requirement. *Hamling v. United States, supra*, 42 U.S.L.W. at 5046. The convictions in *Hamling* were on both substantive and conspiracy counts. Although the Supreme Court did not consider the issue, the Ninth Circuit rejected the defendants' proposed instruction that not only must they know the contents of the materials mailed, but that they must also have had a specific intent to mail what was known and believed to be obscene literature. *United States v. Hamling*, 481 F.2d 307, 318-19 (9th Cir. 1973), *aff'd*, 42 U.S.L.W. 5035 (U.S. June 24, 1974). We agree and now hold that in a prosecution for conspiracy to violate a federal obscenity statute, the Government does not have the obligation of showing that the defendants knew the contents of the material in question were legally obscene. It is sufficient to show that a defendant had knowledge of the contents of the materials he conspired with others to transport in interstate commerce and that he knew the character and nature of the materials. *See Hamling*

v. United States, supra; United States v. Marks, 364 F. Supp. 1022, 1027, (E.D. Ky. 1973); *United States v. Luros,* 260 F. Supp. 697, 702 (N.D. Iowa 1966), *rev'd on other grounds,* 389 F.2d 200 (8th Cir. 1968). There is ample evidence in the record to support a jury finding that the individual defendants were aware of the nature and contents of the material which the jury found to be obscene.

The individual defendants challenge the sufficiency of the evidence to sustain a conspiracy conviction. In considering the sufficiency of the evidence to support a verdict in a criminal case, the evidence must be considered in the light most favorable to the prevailing party. *United States v. Lodwick,* 410 F.2d 1202, 1204 (8th Cir. 1969). In our review of the record we find abundant evidence to support the conspiracy convictions. Defendants Friedman, Mitchum, Fishman and Boyd were unquestionably knowingly involved in a large scale operation to distribute "hard-core" pornographic material via the United States mails in violation of 18 U.S.C. § 1465 and 2.

Two multiple count indictments charging defendant Friedman with substantive violations of 18 U.S.C. §§ 1465 and 2 were dismissed during the trial.[8] the same publications which were the basis of the substantive counts were used as evidence of overt acts committed by Friedman in furtherance of the conspiracy. Friedman argues that the doctrines of double jeopardy and collateral estoppel require reversal of his conspiracy conviction. Such argument is without merit. A plea of double jeopardy is not appropriate where there is a lack of identity between the two offenses due to the dissimilarity in the elements of proof. *Ferina v. United States,* 340 F.2d 837, 839 (8th Cir. 1965). In *Blockburger v. United States,* 284 U.S. 299, 304 (1932) the Supreme Court held:

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[8] The issue of the propriety of these dismissals is not before us in this appeal.

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not.

The federal conspiracy statute,[9] and 18 U.S.C. § 1465 are separate and distinct statutory provisions. *See* Pinkerton v. United States, 328 U.S. 640, 643 (1946). The factual proof for one is different from the other. The doctrine of collatera estoppel in criminal cases requires that the same issue must have been determined favorably to the accused in prior or concurrent litigation between the parties. *Ferina v. United States, supra.* The issue of Friedman's guilt of violating § 1465 is not the same as his guilt of conspiracy to violate said section. The commission of a substantive offense and a conspiracy to commit it are separate and distinct offenses. *Pinkerton v. United States, supra; see United States v. Cole,* 449 F.2d 194, 201 n.4 (8th Cir. 1971). Thus the dismissal of substantive counts against defendant Friedman does not bar prosecution for conspiracy to violate the substantive offense.[10]

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[9] U.S.C. § 371 provides:

> If two or more persons conspire to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

[10] Furthermore, the Eighth Circuit has consistently held that inconsistency of a verdict on separate counts of an indictment does not entitle a defendant to a reversal on the count he was convicted of. *United States v. Wetzel,* 488 F.2d 153, 155 (8th Cir. 1973). Thus, Friedman's acquittal on the substantive counts does not require reversal of his conviction on the conspiracy count.

We have considered other assignments of error by the various defendants and find them to be without merit.

Judgments affirmed as to all defendants.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

September Term, 1974
No. 74-1224
THE UNITED STATES,
Appellee,
v.
ROBERT L. MITCHUM, et al., etc.,
Appellants.

No. 74-1225
THE UNITED STATES,
Appellee,
v.
MELVIN FRIEDMAN, etc.,
Appellant.

No. 74-1226
THE UNITED STATES,
Appellee,
v.
WENDELL BOYD,
Appellant.

No. 74-1227
THE UNITED STATES,
Appellee,
v.
SOONER STATE NEWS AGENCY, INC.,
Appellant.

Appeals from the United States
District Court for the
Eastern District of Arkansas

Petition of appellants for rehearing filed in the above causes having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

January 7, 1975

APPENDIX C

UNITED STATES CONSTITUTION

AMENDMENT I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without compensation.

AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

TITLE 18, UNITED STATES CODE

Section 2. Principals.

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Section 371. Conspiracy.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons to any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Section 1465. Transportation of Obscene Matters for Sale or Distribution.

Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

The transportation as aforesaid of two or more copies of any publication or two or more of any article of the character described above, or a combined total of five such publications and articles, shall create a presumption that such publications or articles are intended for sale or distribution, but such presumption shall be rebuttable.

When any person is convicted of a violation of this Act, the court in its judgment of conviction may, in addition to the penalty prescribed, order the confiscation and disposal of such items described herein which were found in the possession or under the immediate control of such person at the time of his arrest.